51.701(b) defines "telecommunications traffic" to exclude "telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access (see FCC 01-131 [the *ISP Remand Order*], paragraphs 34,36,39, 42-43)."[64]

As noted, Congress made Section 251(g)'s exemption of interstate and intrastate access charges from the scope of Section 251(b)(5) temporary. The Commission has recognized that Section 251(g) preserves access charge regulations only "unless and until the Commission. . . . should determine otherwise."[65] As the D.C. Circuit noted, "that section is worded simply as a transitional device, preserving various LEC duties that antedated the 1996 Act until such time as the Commission should adopt new rules pursuant to the Act."[66] Thus, the preexisting compensation arrangements – whether established by "court order, consent decree, or regulation, order or policy of the Commission" – remain in effect under Section 251(g) only until the Commission elects "explicitly [to] supersede them."[67]

This logical interpretation of Section 251(b)(5) and 251(g) has been embraced by incumbent LECs. In comments submitted in response to the Commission's *Intercarrier Compensation NPRM*, BellSouth observed that "Section 251(g) . . . contains no jurisdictional qualification or limitation on the scope of access services subject to that section . . . ."[68] Qwest recognized that Section 251(g) "grandfathers" certain classes out

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[64] 47 C.F.R. § 51.701(b)(1).

[65] *ISP Remand Order*, 16 FCC Rcd. at 9169 (¶ 39); *see also Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd. 385, 407 (¶ 47) (1999).

[66] *WorldCom*, 288 F.3d at 430.

[67] 47 U.S.C. § 251(g).

[68] Comments of BellSouth, *Intercarrier Compensation NPRM*, CC Docket No. 01-92, at 27, (¶ 61) (filed Aug. 21, 2001). BellSouth also asserted that Section 251(g) created an independent grant of statutory authority. That assertion is questionable following *WorldCom v. FCC*, 298 F.3d at 430.

of the reciprocal compensation requirement of Section 251(b)(5), but also that Section 251(g) authorizes the Commission to implement new rules for the 251(g) traffic. Thus, Qwest reasoned, "over time, as the FCC exercises its authority to 'supersede by regulation'" the grandfathering provisions of section 251(g), the class of traffic subject to section 251(b)(5) may increase in size."[69] Similarly, after engaging in a comparable statutory analysis, SBC reached the "logical conclusion" that "the Commission has authority under Section 251(b)(5) and 251(g)" to implement new compensation requirements "for interstate and intrastate traffic."[70]

The courts have held that IP-originated communications are enhanced/information services and when two carriers collaborate to handle this traffic they must do so pursuant to Section 252(b)(5) rather than the access charge regime.[71] At least one court has also held that an entity which does not hold itself out as a carrier and provides or supports VoIP is an enhanced/information service provider and is not subject to access charges.[72]

VI. FORBEARANCE FROM 47 U.S.C. § 251(g), RULE 51.701(b)(1) AND,

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[69] Comments of Qwest Communications International, Inc., *Intercarrier Compensation NPRM,* CC Docket *No.* 01-92, at 41 (filed Aug. 21, 2001).

[70] Comments of SBC Communications Inc., Intercarrier *Compensation NPRM,* cc Docket No. 01-92, at 39 (filed Aug. 21, 2001); see *also* Reply Comments of SBC Communications Inc., *Intercarrier Compensation NPRM, CC Docket No.* 01 -92, at 26-27 (filed Nov. 5, 2001) ("As the Commission recently concluded in the *ISP* Intercarrier Compensation Order. Section 251(b)(5) applies on its face to the transport and termination of *all* telecommunications traffic without exception. To the extent Section 25 l(g) exempts certain categories of telecommunications services from automatic application of the reciprocal compensation obligations of Section 251(b)(5), it merely gives the Commission flexibility to transition from existing access regimes to a new regulatory regime . . . .") (internal footnotes omitted).

[71] *Southwestern Bell Telephone, L.P., d/b/a SBC Missouri v. Missouri Public Service Commission,* 461 F. Supp. 2d 1055; 2006 U.S. Dist. LEXIS 65536 *49-*81 (E.D. Mo. 2006); *In re Transcom Enhanced Servs.,* LLC. 2005 Bankr. LEXIS 1244 (Bankr. N.D. Tex. Apr. 28. 2005).

[72] *In re Transcom Enhanced Servs.,* LLC. 2005 Bankr. LEXIS 1244 (Bankr. N.D. Tex. Apr. 28. 2005). The same court entered a similar finding on September 20. 2007. *In re Transcom Enhanced Servs., LLC,* Case No. 05-31929-HDH-11. Order Granting Transcom's Motion For Partial Summary Judgment Based on the Affirmative Defense That Transcom Qualifies as an Enhanced Service Provider (Bankr. N.D. Tex. Sept. 20. 2007).

WHERE APPLICABLE, RULE 69.5(b) IS REQUIRED UNDER SECTION 10(a).

When Congress enacted the Telecommunications Act of 1996, it recognized that the terms of the Act itself, as well as the Commission's rules implementing the Act, could impede the goals of lower prices, higher quality, and rapid innovation. Congress empowered (and, in fact, required) the Commission to "forbear" from enforcing any regulation or statutory provision that would hamper the achievement of those goals, and it set forth a three-pronged test for forbearance.[73] The Commission has recognized that its forbearance obligation is an "integral part" of the Act's 'pro-competitive, de-regulatory' framework designed to make available to all Americans advanced telecommunications and information technologies and services 'by opening all telecommunications markets to competition'"[74]

Section 10 of the Communications Act requires the Commission to forbear from applying any regulation or any provision of the Act to a telecommunications carrier or telecommunications service, or to a class of telecommunications carriers or services, if the Commission determines that three conditions have been satisfied."[75] Specifically, the obligation to forbear arises when (1) enforcing the regulation or provision in question is not necessary to ensure that the charges and practices of carriers "are just and reasonable and not unjustly or unreasonably discriminatory;" (2) enforcing the regulation or

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[73] 47 U.S.C. § 160; *see also Cellular Telecoms. & Internet Ass'n v. FCC*, 330 F.3d 502,504-05 (D.C. Cir. 2003).

[74] Order, *Petition for Forbearance of Iowa Telecommunications Services, Inc. d/b/a Iowa Telecom Pursuant to 47 U.S.C. § 160(c)from the Deadline for Price Cap Carriers to Elect Interstate Access Rates Based on the CALLS Order or a Forward Looking Cost Study*, 17 FCC Rcd. 24319,24321 (¶ 6)(2002) (quoting Joint Explanatory Statement of the Committee of Conference. S. Conf. Rep. No. 230,104th Cong., 2d Sess. 113 (1996)).

[75] See 47 U.S.C. § 160(a). Section 10(c) authorizes any telecommunication carrier to submit a petition to the Commission requesting that it exercise its forbearance authority. See 47 U.S.C. § 160(c).

provision "is not necessary for the protection of consumers;" and (3) forbearance from enforcing the regulation or provision is "consistent with the public interest."[76] With respect to this last factor – whether forbearance is consistent with the public interest – Section 10(b) directs the Commission to consider the impact of forbearance on competitive market conditions, including the extent to which forbearance "will enhance competition among providers of telecommunications services."[77]

Pursuant to its duty under Section 10(a), the Commission must forbear from enforcing Section 251(g), the exception clause of Rule 51.701(b)(1), and, where applicable, Rule 69.5(b) to the extent that they impose interstate or intrastate switched access charges on IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications. First, forbearance is consistent with the public interest and will promote competition. A decision to forbear would reduce regulatory uncertainty regarding Voice-embedded Internet communications and eliminate much of the associated cost and uncertainty that the cartel's onslaught is breeding and will continue to breed. Additionally, forbearing from enforcement would spur innovation, increase the uses of GFNs by extending their capability to the PSTN and regular PSTN users (with the concomitant compounding of value due to network effects), and boost the preeminence of American enterprises in this rapidly emerging field.

Second, enforcing Section 251(g), the exception clause of Rule 51.701(b)(1), and, where applicable, Rule 69.5(b) is not necessary to ensure that the "charges" and "practices" for the exchange of IP-PSTN and incidental PSTN-PSTN Voice-embedded Internet communications are just, reasonable, and not unreasonably discriminatory. In the

[76] 47 U.S.C. § 160(a)(1)-(3).

[77] 47 U.S.C. § 160(b).

absence of these provisions, the exchange of IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications will simply be governed by Section 251(b)(5), which will ensure that charges and practices are just, reasonable and nondiscriminatory through the statutorily prescribed processes to establish the terms and conditions of interconnection among carriers.

Third, enforcement of this rule and statutory provision is not necessary for the protection of consumers. In fact, forbearance from the rule and statutory provision will advance the interests of American consumers. Most fundamentally, access charges for Voice-embedded IP-PSTN and incidental PSTN-PSTN IP communications service cannot be "necessary" to achieve the consumer protection objective of universal service because the Act itself authorizes (and, in the case of interstate support, prescribes) the use of explicit universal service support to ensure affordable and reasonably comparable end-user rates in lieu of implicit subsidies buried in access charges. In any event, the best way to address the pressures that Voice-embedded Internet communications would place on the outmoded access charge regime is to reform entirely intercarrier compensation on circuit-switched networks, as the Commission has proposed to do. The growth of IP-PSTN and incidental PSTN-PSTN Voice-embedded Internet communications are unlikely to grow to such a significant extent to fundamentally upset ILEC finances and certainly not to an extent that the delivery of universal service will be endangered.[78] Furthermore, allowing GFNs and other Internet-based social networks to communicate with members of other networks, including the PSTN, would, in fact, serve to advance the goals of universal service and create positive network effects across communications

[78] When the two largest monopolies are reaping more than $30 billion in trailing 12 month EBITDA each, one has to wonder if competition does in fact exist, and one certainly wonders why any policy which supports non-cost based rates are needed for such profits.

platforms and networks.

A. Forbearance from Extending Interstate and Intrastate Access Charges to IP-PSTN and Incidental PSTN-PSTN Voice-Embedded Internet Communications Serves the Public Interest

First and foremost, pursuant to Section 10(a)(3), the Commission must consider whether forbearance from enforcing the regulation or provision is "consistent with the public interest."[79] The Act provides that this condition can be satisfied if the Commission concludes that forbearance "will promote competition among providers of telecommunications services."[80] Likewise, the Commission has reasoned that forbearance is appropriate if it is likely to result in increased competition and innovation.[81]

Forbearing from the application of switched access charges to IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications, and making a clear statement that the exchange of such traffic will be governed by Section 251(b)(5), will boost competition and the introduction of innovative new services in a number of ways. Specifically, forbearing from enforcement would reduce regulatory uncertainty and associated costs. Feature Group IP, for one, will be able to immediately expand its operations because the ILECs (and particularly at&t) will no longer be able to tie us down in litigation for years on end in any and every state. Forbearance will increase investment in advanced services specifically and in the telecommunications sector generally. This will promote innovation, lead to greater efficiencies for customers,

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[79] 47 U.S.C. § 160(a)(3).

[80] 47 U.S.C. § 160(b).

[81] If enforcement of the provision would "impede[] [the petitioner] from quickly introducing new services in response to customer demands and opportunities created by technological developments" or if it would "diminish[] [the petitioner]'s ability to reduce prices and improve service in response to competitive pressures," then the third criterion is satisfied Memorandum Opinion and Order. *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunication Services*, 17 FCC Rcd. 27000,27014-15 (¶ 26) (2002).

preserve U.S. preeminence in the field of Internet and telecommunications applications, and spur job growth throughout the U.S.

1. Forbearance would reduce regulatory uncertainty and avoid unnecessary costs during a transition to a uniform intercarrier compensation regime.

In general, interconnected LECs were not collecting interstate or intrastate access charges from telecommunications carriers serving IP-PSTN voice-embedded IP communications providers when Level 3 filed its petition for Forbearance. In the absence of policy creation over the past three years, individual LECs like at&t accelerated their efforts to levy and collect access charges on IP-PSTN communications that they exchange with CLECs. In fact, they have also succeeded in blocking such traffic, to the detriment of users.[82] Regardless of whether the FCC ultimately concludes that IP-PSTN traffic is wholly interstate, or somehow contains a separable mix of interstate and intrastate traffic, disputes over whether access charges should apply to IP-PSTN traffic have arisen as between Feature Group IP and at&t in the context of interconnection arbitrations. We have welcomed an arena to litigate the details of signaling, routing and rating of all new technology traffic, whereby we could take the results and build our business. Our reasoned and measured attempts have failed and failed miserably as evidenced by five plus years of stagnation and intransigence at the Texas PUC.[83] Level 3 opined that pursuing the signaling, routing and rating treatment VoIP would be a "cauldron of regulatory hell." They were almost right. As it turns out, at&t has

[82] Feature Group IP has launched a non-geographic "500" number based service and at&t has refused to route to such numbers.

[83] *See* Texas PUC Docket 26381 which is six years old, and has come to the eve of arbitration three times, each time to be delayed by at&t. It has now has been put in official "hibernation" for an undetermined period by the Texas PUC while they await a determination by the Commission on VoIP issues.

succeeded to create a "Regulatory Purgatory," which is slowing and distorting the development and implementation of IP-PSTN voice-embedded IP communications.

Moreover, the Commission, state commissions, and the courts would not only face the question of whether access charges or reciprocal compensation arrangements would apply, but, if access charges apply, judicial and regulatory bodies would also have to determine how such arrangements would be implemented. Would every inventor of a new technology be deemed a carrier? Are the people who use Asterisk carriers?[84] Is a corporate entity that uses an IP PBX now a carrier, and, if so, even if the application is a classic "leaky PBX" approach? What about the ISP that provides Internet access to them and may not even know this use is being made of the Internet access? Are those who sell Ooma-like edge devices carriers?[85] Are GFNs carriers? What if members of one GFN are also members of another GFN? If they are not carriers, is it reasonable to impose carrier-related economic burdens but deny carrier-related rights, such as interconnection under Sections 201, 251, 252 and 332 of the Communications Act? Would the Sections 251/252 regime apply with the attendant state filed agreements and state-level arbitrations to reach contract terms? If not, then what regime does apply? Would ILECs, for example, have the right to insist that interconnecting carriers, once deemed carriers, purchase or use access trunks in addition to "local" interconnection trunks, even when traffic volumes would not justify separate facilities and differential routing of traffic based on some perceived method of "jurisdictionalizing" the traffic for rating purposes? Would virtual foreign exchange IP-PSTN communications be subject to access charges

[84] Asterisk is an open source platform that allows the user to download software to essentially become his or her own provider of telecommunications services without the need for an intermediating service provider. http://www.digium.com/en/index.php

[85] http://www.ooma.com/

or reciprocal compensation? Would LECs be permitted to require Voice-embedded IP communications providers to engineer their networks, equipment and systems in a manner that allows regulators to track origination and termination locations for IP services, or pay access rates by default? What will become the signaling standards, Session Initiation Protocol, SS7, UGT, and other standards, protocols, applications and services on the frontier borderland between telephony and Internet-based communications applications? Fighting these and innumerable other details before each and every state commission, the FCC, and the courts would add further substantial, but unnecessary, costs and regulatory uncertainty.

Apart from the unnecessary costs that piecemeal, state-by-state battles over access charge issues would impose, a more fundamental consideration supports forbearance. To apply access charges to IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications traffic now means applying access charges during the transition to a uniform intercarrier compensation regime, only to remove those charges as part of that transition.[86] This result simply makes no sense. Applying access charges to these Voice-embedded IP communications only will serve to enhance ILECs' reliance on perpetuating the existing broken patchwork of intercarrier compensation mechanisms, rather than propelling their evolution to a unified regime. The best approach, consistent with the Commission's objective of achieving a uniform intercarrier compensation regime, is to allow IP-PSTN Voice-embedded IP communications to operate on a rationalized, "minute-is-a-minute" basis, with all traffic exchanged under Section 251(b)(5)'s reciprocal compensation rules. As Voice-embedded IP grows, the base of traffic subject

[86] *See, e.g., Intercarrier Compensation NPRM*, 16 FCC Rcd. 9610.

to a rationalized compensation mechanism also will grow. This evolutionary path will increase the incentive for all participants in the legacy circuit-switched access charge regime to work toward a rapid transition to a uniform intercarrier compensation mechanism.

Furthermore, the administrative cost of implementing two massive changes (a piecemeal conversion to an access charge regime and, later, a wholesale conversion to a unified intercarrier compensation regime) would be vast for the Commission, state regulators, ILECs, and providers of Voice-embedded IP communications services. Changes would have to be made to existing network architecture, such as ordering Feature Group D trunks in addition to local interconnection trunks. Billing systems and equipment would have to be developed. Voice-embedded IP communications providers would face the challenge of attempting to determine the endpoints of communications for which there is no network-provided geographic endpoint information. Such expenses would represent pure deadweight loss when the Commission moves to a uniform intercarrier compensation mechanism in the future. Because enforcement would lead to such unnecessary uncertainty and expense, the Commission should conclude that forbearance is in line with the public interest.

2. *Forbearance would promote innovation.*

Additionally, forbearing from enforcement of Section 251(g), the exception clause of Rule 51.701(b)(1), and, where applicable, Rule 69.5(b) would prompt more widespread innovation for the benefit of consumers. Because Voice-embedded IP providers and Voice-embedded IP application developers would know the precise scope of the single compensation regime covering all of their traffic, their business risks would

be reduced. Absent forbearance, they would be forced to rely on inefficient business models and network architectures capable of supporting the patchwork of existing regimes – reciprocal compensation, interstate access and intrastate access. And they will have to continue defending against the ILECs' attack on their right to attach to and interconnect with the PSTN as end users rather than some form of *quasi* carrier. Nowhere is this more important than in supporting the continued formation and development of voice enabled GFNs.

If the cost of regulatory uncertainty is eliminated, investment would increase, and providers and application developers would be able to devote more resources to the development of more innovative products to throw into the competitive mix. Moreover, when crafting new products and services, providers and application developers would not have to include mechanisms designed to apply the outdated and obsolete access charge regime to technologies that are not inherently capable of jurisdictional separation. They can focus on deployment of their application rather than construction or assembly of a carrier-like network. Problems that would be confronted by innovators of Voice-embedded IP communications business models servicing and relying upon symbiosis and a mutually-virtuous relationship with GFNs, and the attendant "leaky PBX" issues created by their technology become moot. The issue then becomes simply a pure marketplace competition question over whether one provider's GFN is better or worse than the next model.

The potential innovations on the horizon could be truly extraordinary. New Voice-embedded IP applications could blaze an entirely new trail, as an increasing number of IP-based devices are used to communicate both with other IP devices and with legacy

PSTN devices and linking and changing the usefulness of the devices through the continued development of GFNs. These devices will integrate voice with data applications; they will provide advanced functionalities that are only available in crude form on the circuit-switched network. Forbearance would speed the development of these new products and social and economic networks and pave the way for other, as yet undreamed applications.

Furthermore, GFNs will drive broadband use and deployment. Historically, a major impediment to even greater increases in broadband penetration is consumers' perception that broadband lacks significant value.[87] Driving up broadband penetration will stimulate further innovation, both in Voice-embedded IP communication and in other uses for "always-on" broadband connections. The Commission can ensure that legacy access charge rules do not impede this additional broadband penetration and innovation by granting the forbearance requested herein.

3. Forbearance would create greater efficiencies, versatility and control for users.

By forbearing, the Commission would also establish a framework that would put the widest possible array of applications in the hands of consumers. Because a uniform reciprocal compensation regime for IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications would lead to the quicker development of innovative applications, consumers would benefit most immediately and most profoundly.

4. Forbearance would reestablish U.S. preeminence in the field.

[87] *See, e.g.*, Nat'l Telecomm. Coop. Ass'n. 2003 Internet/Broadband Availability Survey Report at 7 (May 2003) available at http://www.ntca.org/content_documents/ACF36B6.pdf

Finally, forbearance also would drive continued growth in the U.S. high-tech and communications industry, and would be a major driver toward reestablishment of American preeminence in the field of emerging technologies. Let's face it: the ILECs are not innovators, and they are purposefully holding back others who are. Just as American firms have been at the forefront of the development and expansion of Internet access and the rapid development of Internet-based applications, so too are they poised to lead with technologies and applications geared toward the convergence of voice and data applications as it relates to GFNs. If the Commission grants this Forbearance Petition, U.S. Voice-embedded IP firms – established companies, small start-ups, research universities, and garage-based entrepreneurs alike – will be able to compete with each other and with foreign competitors, without suffering from the disadvantage of regulatory uncertainty and expense.

For all these reasons, grant of this Petition is in the public interest, and, therefore, the requirements of Section 10(a)(3) are satisfied.

B. Enforcement is Not Necessary to Ensure That Charges or Practices by, for, or in Connection with the PSTN Origination or Termination of Voice-Embedded IP Communications Are Just and Reasonable and Not Unjustly or Unreasonably Discriminatory.

Enforcement of Section 251(g), the exception clause of Rule 51.701(b)(1), and, where applicable, Rule 69.5(b) is not necessary to ensure that the charges and practices for the exchange of IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications are just, reasonable, and not unjustly or unreasonably discriminatory;

thus, the requirement of Section 10(a)(1) is satisfied.[88] Notably, even in the absence of Section 251(g), the exception clause of Rule 51.701(b)(1) and Rule 69.5(b), there will remain a statutory and regulatory framework to govern intercarrier compensation between the LEC and the telecommunications carrier serving the Voice-embedded IP communications provider – the reciprocal compensation provisions of Section 251(b)(5) and Part 51, Subpart H of the Commission's rules.

Pursuant to Section 252(d)(2)'s pricing standards, the Act assures that the LEC terminating IP-PSTN or incidental PSTN-PSTN Voice-embedded IP communications will recover the "costs associated with the transport and termination on [that] carrier's network facilities of calls that originate on the network facilities of the other carrier."[89] Under the Act, such costs are determined "on the basis of a reasonable approximation of the additional costs of terminating such calls."[90] The rates for termination are set by the parties in interconnection agreements and, if necessary, through arbitration before state commissions. When the state commission hears an arbitration, it is charged with setting termination rates at a level that is just and reasonable as defined by Section 252 and the Commission's Part 51 pricing rules.[91] Thus, the charges and practices for exchange of traffic from a Voice-embedded IP communication provider's telecommunications carrier service to a terminating LEC pursuant to Section 251(b)(5) will be just and reasonable.

ILECs can be expected to argue that exchanging traffic pursuant to Section 251(b)(5) does not provide them with just and reasonable compensation when an IP-PSTN or incidental PSTN-PSTN Voice-embedded IP communication originates over the

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[88] 47 U.S.C. § 160(a)(1).

[89] 47 U.S.C. § 252(d)(2)(A)(i).

[90] 47 U.S.C. § 252(d)(2)(A)(ii).

[91] *See* 47 U.S.C. § 252(d)(2).

ILEC's legacy PSTN network. This is incorrect. Much of the argument pertains to terminating traffic. To date no real claim that ILECs are being deprived of any originating access to which they are in fact or even arguably entitled. On the originating side the ILECs are recovering originating access when their customers dial 1+, a dial around prefix or an 8YY number.[92] To the extent they are not recovering access, they recover The incumbent LEC is not denied recovery of any costs it incurs to originate traffic; it simply must turn to its own customer for recovery of those costs rather than to interconnected carriers and the customers of those interconnected carriers.[93]

ILECs may argue that they cannot recover origination costs from users because of state commission limits on retail end-user prices and FCC limits on the level of the subscriber line charges. These arguments, however, sweep too broadly and ignore regulatory constitutional safeguards with respect to limits on retail end-user prices. Existing ILEC rates are more than adequate to ensure LECs have a reasonable opportunity to recover their prudently incurred costs.[94] Even more importantly, however, ILECs generally have other remedies available to them. With respect to interstate subscriber line charge limits, for example, ILECs could, in an appropriate case, petition the Commission for a waiver of such caps, or make an above-band filing under the price cap rules. An ILEC also may seek to initiate new state rates, or to have state or Federal

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[92] This would not change under Feature Group IP's request. If a telephone toll call is necessary to reach an IP-based platform, then it will still be treated as a telecommunications service and subject to access charges under Rule 69.5(b). If the ILEC user dials a local number to reach an ESP platform, then the ILEC will recover the cost through local rates. If the ESP platform is served by a CLEC, then the ILEC will pay the *ISP Remand* or state § 251(b)(5) rate to the serving CLEC, since the latter situation is in all ways the same as dial-up traffic to an ISP.

[93] The Commission has previously required carriers to seek compensation from their own customers rather than interconnected carriers. In the *ISP Remand Order*, the Commission, acting pursuant to Section 251(g) and Section 201, required CLECs terminating ISP-bound traffic to recover the cost of terminating this traffic from their ISP customers. See *ISP Remand Order* 16 FCC Rcd. at 9181-90 (¶¶ 67-83).

[94] *See FPC v. Hope Natural Gas Co.*, 320 U.S. 591 *(1944)*.

retail rate limits set aside as confiscatory takings. For these reasons, the requested forbearance would not result in unjust or unreasonable charges or practices.

The ILECs' plea for subsidy by competitors and new technology uses and entrants is ultimately an assertion that they must be made whole when they lose revenues as a result of competition. They want immunity from the competitive market – at the same time they extol "market principles" when it comes to their own operations and services. The Commission long ago rejected this notion when it held that the then-GTE's "Efficient Component Pricing Rule" (which was purposefully designed to maintain the same level of profit from unbundling and interconnection as would be extracted in the absence of competition) in the *Local Competition Order*.[95]

Nor would grant of this petition be unreasonably discriminatory. The access charge regime today can hardly be considered part of a coherent system of intercarrier compensation with logically defined boundaries. It is a regime that is clearly and inevitably in a transition, as the Commission has recognized in issuing its *Intercarrier Compensation NPRM*. During this transitional period, while the Commission is formulating a uniform intercarrier compensation regime, it is not unreasonably discriminatory for the Commission to take a class of traffic – IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications – which today generally is not subject to intrastate or interstate access charges, and to treat that traffic in a uniform manner consistent with making a transition to a uniform intercarrier compensation regime. In fact, explicitly excluding this traffic from the legacy access charge regime, a regime to

[95] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, ¶¶ 633, 660-662, 708-711, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*").

which Internet communications were never party, would serve to propel movement towards a forward-looking, more justifiable, uniform intercarrier compensation regime, by categorically stating that ILECs cannot rely on the access charge system to extract monopoly rents from voice-embedded IP applications. ESP traffic has always been exempt. The ILECs want to change the rules and eliminate the exemption. They just decided it was gone and have acted accordingly with extraordinary enforcement and harassment. They forgot, however, that this Commission must be the one to promulgate any rule change.

It is wholly legitimate for the Commission to recognize that it would be difficult, if not impossible, to determine whether specific IP-PSTN traffic begins and ends within the same LEC local calling area, different LEC local calling areas within the same state, or different LEC local calling areas across state lines. Indeed, it already did so in the *Vonage Order*.[96] The inability to determine the geographic end-points of a Voice-embedded IP communication justifies selecting the only mode of intercarrier compensation – the statutory default of Section 251(b)(5) – that can be applied to all Voice-embedded IP communications regardless of geographic endpoint.

Accordingly, the requirements of Section 10(a)(1) are fully satisfied. Enforcement of Section 251(g), the exception clause of Rule 51.701(b)(1), and, where applicable, Rule 69.5(b) is not necessary to ensure that rates and practices for the exchange of IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications are just, reasonable and non-discriminatory.

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[96] Memorandum Opinion and Order, *In the Matter of Vonage Holdings Corporation for Declaratory Ruling on Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, FCC 04-267,19 FCC Rcd 22404 ¶ 9 (rel. Nov. 2004) ("*Vonage Order*").

C. Enforcement Is Not Necessary for the Protection of Consumers.

Enforcement of Section 251(g), Rule 51.701(b)(1), and, where applicable, Rule 69.5(b) with respect to IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications is also not necessary for protection of consumers.[97] There is simply no tenable argument that grant of this Petition would adversely affect consumers. The ILECs cannot show that the exclusion of IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications applications from the access charge regime would somehow lead to such substantial increases in end-user rates that those rates would become unaffordable and subject to wide discrepancies between urban and rural areas, and the FCC and state commissions would refuse to address such discrepancies through statutorily-authorized universal service mechanism.[98] There is absolutely no evidence to suggest that these consequences would arise. There is no evidence that the Commission and state commissions would fail to exercise their statutory authority pursuant to Section 254 to address any such result.

The other side of the issue – one the ILECs pretend does not and cannot exist – is that there will be an incredible net-positive result to society when as a consequence of forbearance, more consumers began to use voice-embedded IP applications and rapid deployment of more ubiquitous GFNs are deployed. Imposing access charges on IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications traffic (which, as noted above, is generally not subject to interstate or intrastate access charges today) is

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[97] 47 U.S.C. § 160(a)(2). The D.C. Circuit has upheld the Commission's determination that, as used in this context, "necessary" does not mean "essential" for the achievement of the statutory or regulatory purpose. Rather, "the term 'necessary' . . . mean[s] that there must be strong connection between what the agency does by way of regulation and what the agency permissibly seeks to achieve with that regulation." *Cellular Telecoms. & Internet Ass'n v. FCC*, 330 F.3d 502, 504 (D.C. Cir. 2003).

[98] *See* 47 U.S.C. § 254(e)-(f).

wholly unnecessary to protect the future of universal service, and could actually promote more user control and variance in communications and promote universal service for advanced Internet communications.

Although access charges historically provided implicit support for basic local telephone service in rural and high cost areas, grant of this Petition will not – as some ILECs are likely to suggest – lead to the demise of universal, affordable, and reasonably comparable telephone service in rural and high-cost areas. The ESP exemption that was first enunciated in the 1980s and preserved in the 1990s did not lead to the end of the world. Making it clear that IP-PSTN and incidental IP-PSTN traffic is included in that exemption and the intercarrier compensation regime that covers it will not either.

While some business and residential users are migrating to IP-based communications for at least some of their voice communications, their numbers are still relatively small and, as the chart presented below demonstrates, unlikely to have a significant impact on PSTN revenues in the near term. Additionally, to the extent that there is some movement towards voice-embedded IP applications and away from PSTN communications, wouldn't this serve as a dramatic boon to American communications capabilities and productivity?

Moreover, any argument that grant of this Petition would disrupt implicit support flows necessary to support universal service ignores the fact that this Commission has already decided to charge "revenue producing business models" in the VoIP area with USF obligations.[99] Further, this Commission has been removing implicit universal

[99] Interestingly, this Commission has refrained from addressing the fact that many VoIP applications are free and the positive universal service attributes these services bring to society. Feature Group IP wonders if perhaps more attention, from the universal service perspective, should be given to the utilization of free

service support from interstate access charges. (Likewise, many state commissions have removed implicit universal service support from intrastate access charges.) Through the *CALLS Order* and *MAG Order*, the Commission shifted more than $1 billion from implicit access charge-based support to explicit federal universal service funding.[100] By increasing Subscriber Line Charges ("SLCs"), those orders also eliminated billions of dollars of implicit subsidies that were not necessary to maintain affordable and reasonably comparable end-user rates. Furthermore, the Commission recently issued its *Tenth Circuit Remand Order on Universal Service*, in which it took additional steps to make certain that states receive sufficient federal universal service funding to ensure that end-user rates in "non-rural" study areas remain reasonably comparable to nationwide averages.[101]

In addition, the access charges preserved by the exception clause of Rule 51.701(b)(1) and Section 251(g) cannot lawfully be considered necessary for the protection of consumers because of purported effects on access-based implicit subsidies. Section 254(e) requires all interstate universal service support to be "explicit."[102] The United States Court of Appeals for the Fifth Circuit, in its *TOPUC* and *Comsat* opinions, has made very clear that "the plain language of Section 254(e) does not permit the FCC

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and lower cost services thus creating a competitive environment for Universal Service and thereby reducing the amount needed for universal service support subsidies.

[100] *CALLS Order* 15 FCC Rcd. at 12974-76 (¶¶ 30-32)("The CALLS Proposal identifies and removes $650 million of implicit universal service support."); *MAG Order*, 16 FCC Rcd. 19613. *See also* Universal Service Administrative Company, First Quarter 2004 FCC Filing, Appendix HCO1, "High Cost Support Projected by State by Study Area" (quantifying the *MAG Order's* Interstate Common Line Support at $1 14,936,678 per quarter, which *amounts to* $459,746,712 per year).

[101] Order on Remand, Further Notice of Proposed Rulemaking, and Memorandum Opinion and Order, *Federal-State Joint Board on Universal Service*, FCC 03-249,2003 FCC LEXIS 5892 (rel. Oct. 27, 2003) (hereinafter *"Tenth Circuit Remand order"*). "Non-rural" study areas are those in which the ILEC is not a "Rural Telephone Company" as defined in Section 3(37) of the Act, 47 U.S.C. § 153(37). There are many areas that are rural in character within these "non-rural" study areas. *See id.* ¶ 1 n.1.

[102] 47 U.S.C. § 254(e).

to maintain any implicit subsidies."[103] To the extent that any implicit support for universal service remains buried within interstate access charges, those charges "countermand Congress's clear legislative directive. . . that universal service support must be explicit."[104]

To the extent that intrastate switched access rates retain implicit support for universal service, such support also is not "necessary" to support universal service. Section 254(f) of the Act grants state commissions the authority to establish state universal service funds.[105] Although the Commission has held that Section 254(f) does not require states to make universal service support within intrastate access charges explicit,[106] many states have, at least to some extent, adopted state universal service funds that supplement the federal universal service fund.[107] To the extent states have not done so, or have not done so completely, the states commissions failure to address implicit universal service subsidies in a straightforward and competitively neutral manner nearly twelve years after enactment of the 1996 Act does not justify foisting uneconomic intrastate access charges on carriers serving IP communications providers. State inaction after eleven years cannot render subsidy-laden intrastate access charges "necessary" to the protection of consumers. States have alternatives, and they must use them without enabling ILECs to stifle the growth and promise of innovative IP-based communications

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[103] *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393,425 (5th Cir. 1999) (hereinafter *"TOPUC)* (emphasis in original); *see also Comsat Cop. V. FCC*, 250 F.3d 931,938 (5th Cir. 2001)(hereinafter *"Comsat"*). Under *TOPUC and Comsat*, it would be unlawful for the Commission to extend access charges to IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications traffic in order to preserve implicit subsidies in switched access charges.

[104] *Comsat*, 250 F.3d at 938.

[105] 47 U.S.C. § 254(f).

[106] *See Tenth Circuit Remand Order*, 2003 FCC Lexis 5892, *39-40 (¶ 26).

[107] United States General Accounting Office, Telecommunications: Federal and State Universal Service Programs and challenges to Funding, GAO-02-187, at 12-17 (Feb. 4, 2002).

applications. The *Missoula Plan* supporters forcefully argued that the Commission could preempt state access charges when it suited their needs. But formal preemption is not necessary. A simple reaffirmation that this is an exclusively interstate matter, and the Commission has exclusive jurisdiction to determine the compensation regime will more than suffice. Feature Group IP does not request preemption, only a ruling of the obvious: state access does not apply because the traffic is jurisdictionally interstate. This would be nothing more than a reminder that the principles stated in the *Vonage Order* apply and remain.

Accordingly, the exception clause of Rule 51.710(b) and Section 251(g), as it pertains to receipt of switched-access charges for origination or termination of IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications, is not necessary for the protection of consumers. The statutory forbearance requirement in Section 10(a)(2) is therefore satisfied.

VII. CONCLUSION.

Chairman Martin has noted that "[f]undamentally, entry into the phone market benefits consumers, and I will support regulatory action to promote that entry and the competition it enables."[108] The simple action requested in this Forbearance Petition is the missing piece necessary to ensure that Voice-embedded IP applications allow users to avail themselves of the full promise of IP-based communications. Grant of this Forbearance Petition gives providers and users of voice-embedded IP applications the needed certain to deploy and use advance Internet-based communications tools that will propel and revolutionize the ways in which Americans communicate and network.

[108] Remarks of FCC Chairman Kevin J. Martin. National Cable & Telecommunications Association. Las Vegas, NV. May 7, 2007.

The Commission must grant this Petition for Forbearance because, as demonstrated above, each of the three statutory criteria is satisfied in this case: (1) forbearance is in the public interest (Section 10(a)(3)); (2) the regulations and statutory provisions from which forbearance is sought are not necessary to ensure that rates and practices are just and reasonable or not unjustly or unreasonably discriminatory (Section 10(a)(1)); and (3) the regulations and statutory provisions from which forbearance is sought are not necessary for the protection of consumers (Section 10(a)(2)). Forbearance is therefore mandatory under Section 10(a), which states that "the Commission shall forbear" when each of the three criteria is satisfied.[109]

The Commission should forbear without delay. By so doing, the Commission will not only ensure that IP communications and the next wave of truly innovative applications develop quickly and without the unnecessary shackles of intrastate and interstate access charges, but also benefit the country and economy as a whole. "It's incumbent on us to identify good policy going forward and not just shoehorn VoIP into statutory terms or regulatory pigeonholes without adequate justification," stated Commissioner Michael J. Copps at the Commission's forum on Voice over Internet Protocol years ago. "It's no slam-dunk that the old rules even apply."[110] The Commission must heed this wisdom and forbear from old rules (to the extent they even apply) that stifle innovation, consumer choice and opportunity, and serve only to allow would-be monopolists a colorable claim to extract unjustified, monopoly rents from innovative new services and applications while the monopolist maintains a stranglehold on captive

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[109] 47 U.S.C. ¶ 160(a).

[110] Opening Remarks of Michael J. Copps, FCC Voice Over Internet Protocol Forum (Dec. 1, 2003), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-241765A1.pdf (last visited Dec. 19, 2003).

consumers and would-be innovators, who could drive revolutionary changes in America's networking and communications capabilities.

The citizens of this country cry for release from "the phone age." The greatest innovation brought to users by the ILECs is the Princess Phone (and some users got only the shell and rented the guts). This tells us a lot about why the United States is falling behind the rest of the world. Being tied to the selfish interests of entrenched monopolists whose natural incentive is to ration and starve because it limits capital requirements and increases profits is not the way to propel our country back in front of the rest of the pack. This Commission now has a chance to let the change happen. Make the PSTN tail quit wagging the Internet dog. Release the power to innovate so it can operate at the edge, and allow the Internet and the PSTN to interconnect, intercommunicate and interoperate on economic and reasonable terms. The threat of access charges must be removed. Release users from the "phone age" and let them use modern tools.

Respectfully submitted,

/s/

Jonathan Askin
1437 Rhode Island Ave., NW
Suite 109
Washington, DC 20005
+1-631-748-8236
jonathan@askin.us

(Attorney for Feature Group IP)

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APPENDIX A

FEATURE GROUP IP'S INTERNET GATEWAY INTERMEDIATION POINT OF PRESENCE ("IGI-POP") TARIFF